



February 19, 2015

The Honorable Jackie Speier
155 Bovet Road, Suite 780
San Mateo, CA 94402

The Honorable Anna Eshoo
698 Emerson Street
Palo Alto, California 94301

The Honorable John Garamendi
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Davis, CA 95616

The Honorable Jared Huffman
999 Fifth Ave., Suite 290
San Rafael, CA 94901

The Honorable Zoe Lofgren
635 N. First Street, Suite B
San Jose, CA 95112

The Honorable Mike Thompson
1040 Main Street, Suite 101
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The Honorable Mark DeSaulnier
440 Civic Center Plaza, 2nd Floor
Richmond, CA 94804

The Honorable Sam Farr
701 Ocean Street, Room 318C
Santa Cruz, CA 95060

The Honorable Michael M. Honda
900 Lafayette Street, Suite 206
Santa Clara, CA 95050

The Honorable Barbara Lee
1301 Clay Street, Suite 1000-N
Oakland, CA 94612

The Honorable Eric Swalwell
1260 B Street, Suite 150
Hayward, CA 94541

Re: Cargill Inc.'s Redwood City Industrial Salt Harvesting Facility (Facility)

Honorable Members of the San Francisco Bay Area Congressional Delegation:

We received a copy of your February 18, 2015, joint letter to Assistant Secretary of the Army Jo-Ellen Darcy. Unfortunately, it is clear to us that opponents with an obvious agenda have engaged your offices in a calculated campaign of misinformation about our property. We have been involved in over eight years of open, thorough, and transparent engagement, and that process clearly has not been conveyed to you. Not one assertion made in the letter has any basis in fact or law. We regret that you have been misinformed, but please rest assured that we remain available and would welcome the opportunity to answer any questions or concerns you may have.

In the meantime, permit us to provide the facts regarding the specific assertions in the letter, the contents of the joint letter being quoted in italics below, with the appropriate explanation immediately thereafter:

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It has come to our attention that the U.S. Army Corps of Engineers (“Corps”) is considering relinquishing federal Clean Water Act and Rivers and Harbors Act jurisdiction over the Redwood City Salt Plant site in Redwood City, California.

There is no consideration of or request for “relinquishing” anything. The jurisdictional status of this Facility under federal law has never been determined, false assertions to the contrary notwithstanding (see below). Under governing Corps regulations, the timeframe for making a jurisdictional determination (JD) is generally 60 days. The JD for this Facility has been pending with Corps and EPA for nearly 1000 days, almost three years. This will be the first JD ever addressing the law, history, and unique factual dynamics of this Facility.

We are concerned that this decision is being made without full consideration of the consequences for San Francisco Bay and the nation, and without appropriate consultation, dues process, and consideration of the Corps’ own previous determinations.

The concern as stated highlights a fundamental misunderstanding of the current process and context. The Corps and EPA are being asked to make a JD – a legal and factual determination as to what a given parcel of land is and is not through the prism of existing federal law – statute, regulation, and case law. It does not allow or permit any given future use. It does nothing to abridge the future review and approval process under state, regional, and local land use authorities. It identifies the legal status quo, period. Consideration for San Francisco Bay is, of course, of paramount concern for us as well, and that will be foremost in future consideration of possible uses for the Facility. A prime phase wherein that will occur is Redwood City’s analysis under the California Environmental Quality Act, which has yet to begin.

As to “consultation, due process, and consideration of the Corps’ own previous determinations,” any assertion that the process to date has been lacking as to any of those considerations is patently false. As noted, we made a public filing to both the Corps and EPA in May 2012. Since that time, there have been multiple interagency meetings and consultations documented in an extensive administrative record. Again, what is normally a 60-day process has been actively proceeding within both the Corps and EPA for nearly three years. The assertions related to “prior determinations” is addressed below.

We are writing to urge the Corps to comply with the law. The Environmental Protection Agency (EPA) is a co-regulatory partner in the Clean Water Act implementation, and needs to be fully consulted during the process of developing policy and legal interpretations of the Clean Water Act Section 404, under which the Corps regulation of the Cargill site would fall.

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With the possible exception of exceeding the time within which a JD ruling is supposed to be made, the Corps has been painstakingly meticulous in its compliance with the law. As for the EPA, when we filed our application for the approved JD in May 2012, we addressed it openly and equally to both the Corps and EPA. In our application, we expressly requested that EPA exercise its authority under federal law to take responsibility for the Clean Water Act portion of the JD from day one. In responding to that request, EPA chose to keep the Corps in the lead and has been informed and included throughout the process. Over the three years since our application, we have met with both the Corps and EPA with regard to all aspects of our request for the JD.

Further, documents make clear that the EPA has had the written legal and factual analysis of the Corps regarding the question of jurisdiction for nearly a year now, with full opportunity to raise whatever concerns they may have had. Any suggestion that EPA has been excluded from this process, again, is simply false.

Any novel, unilateral re-interpretation of the Clean Water Act must not be created in secret, without opportunity for public input, formal consultation with the EPA, or Congressional approval.

We agree – any “re-interpretation of the Clean Water Act” would require Congressional approval or agency rulemaking. None is occurring here, “novel, unilateral” or otherwise. Whether and to what extent the Clean Water Act applies to this Facility has never been determined. Nothing is being re-interpreted. Quite to the contrary, the Clean Water Act and Rivers and Harbors Act are simply being applied to the facts on the ground. And to our knowledge, at a minimum, the Corps analysis has been reviewed by the Corps, EPA, the Department of Justice, the Department of the Army, and the Office of Counsel for the Army.

We also urge the Corps to be consistent in its interpretation of statute. The Corps has previously indicated in a 2010 Preliminary Jurisdictional Determination [PJD] (attached) that the Redwood City Salt Plant salt ponds are indeed Waters of the United States under the Clean Water Act and within the jurisdiction of the Rivers and Harbors Act.

Here, unfortunately, is perhaps the most egregious example of the campaign of misinformation to which your offices were subjected. By intent and design, a PJD does NOT make a determination of jurisdiction. Purposefully to the contrary, it is a process established by the Corps whereby a landowner and the Corps may “set aside” the often contentious, expensive, and litigation-prone dispute over whether a given site may or may not be jurisdictional. The process, established under Corps Regulatory Guidance Letter (RGL) 08-02, sets aside normal JD procedures and allows the Corps, *without any concession by the landowner*, to treat the site *as if it were jurisdictional*, to explore what a permit for the site might look like, thereby potentially avoiding any battle over a binding JD.

Having been encouraged by agency officials to consider the PJD approach under RGL 08-02, we agreed, at all times expressly reserving all rights. (The very paperwork attached to your own letter

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included the reservation language in the legend of the exhibit. And the opening paragraph on the cover letter from the Corps notes it addresses “areas that *may be* waters of the U.S.”) For more than six years, we met repeatedly with both the Corps and EPA regarding potential consideration of a permit for the Facility. In the interest of brevity, we will just say those efforts proved unavailing. We withdrew the PJD and made the May 2012 request for an approved JD, an actual and binding determination of jurisdiction. Again, there was not and by law *could not* be any determination of jurisdiction in the context of a PJD.

And we feel compelled to point out that opponents of the project that repeatedly make this assertion regarding the PJD are well aware of the legal dynamics involved in the context of a PJD, and the assertion that it is a binding precedent or determination is knowingly false and, unfortunately, is regularly repeated with the intention of misleading you and the public at large.

The Corps also determined in 2008 that the nearly-identical Napa Plant salt ponds just 50 miles north also fall under Clean Water Act and Rivers and Harbors Act jurisdiction.

Again, there is no precedent applicable to Redwood City. The determinations made with regard to the facilities in Napa were only made *after* Cargill had sold and donated the facilities to state and federal resource agencies, retaining no interest in them. It was purely an internal agency-to-agency process with no one providing any factual or legal context, other than the agencies themselves, to the analysis. The question of jurisdiction of the Redwood City Facility has never been answered.

It would be remarkable for these precedents to not be given full consideration by the Corps in its upcoming Jurisdictional Determination.

We know and can assure you, based on our meetings with the agencies, requests for production of documents, and repeated discussions, that all aspects of the PJD, Napa, and countless other considerations were analyzed by the agencies in this three-year process. They all provided information to inform the regulators’ analysis, but they are not “precedents,” as explained above.

Any major re-interpretations of the Clean Water Act must not occur without full public input and consultation between the Corps and EPA. We strongly urge the Corps to comply with the law in a consistent, transparent, and fair fashion.

It is irrefutable that the Corps has painstakingly and transparently applied the law. We know because we have had to patiently endure round after round of questioning, analysis, meetings, data requests, and assurances of an end to the process. As to fairness, we join you in that call. A 60-day process dragging on for three years could hardly be characterized as anything short of “full consideration.” You addressed your letter to Assistant Secretary Darcy. Assistant Secretary Darcy has already taken the extraordinary step of doing a personal review of the Corps analysis of the Facility, and just her review alone went on for seven months.

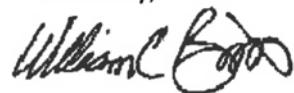
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Your collective interest in this regionally significant Facility is both appropriate and welcome. We believe the Facility presents an unparalleled opportunity to use this industrial site as the catalyst for extraordinary benefits for Redwood City, the region, and, indeed, the entire Bay with the potential for reaping both environmental and economic opportunities. But that interest and consideration must be informed by the true facts about the Facility, the process to date, and the process that has yet to begin. We would welcome the opportunity to meet with you and discuss all that has transpired to date as well as the process moving forward. Thank you for your consideration of our views.

Sincerely,



William C. Britt
President
CARGILL LAND MANAGEMENT